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HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 248

UNITED STATES OF AMERICA,
Petitioner,

vs.

NORTON CLAPP.

RESPONDENT'S ANSWER TO PETITIONER'S REQUEST FOR A WRIT OF CERTIORARI.

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INDEX.

	PAGE
Opinion Below	1
Statement of the Case	1
Questions Presented	3
Reasons for Denying the Writ	4
Conclusion	11

Table of Cases.

Callanan Road Improvement Co. v. United States, 345 U. S. 507	9
Carriso, Inc. v. United States, 106 F. (2d) 707 (C. C. A. 9)	10
Cohens v. Virginia, 6 Wheat. 264	10
Compagnie General Transatlantique v. United States, 21 F. (2d) 465, affirmed 26 F. (2d) 195 (C. C. A. 2).	10
Delgadillo v. Carmichael, 332 U. S. 388	7
Dooley v. United States, 182 U. S. 222	10
Federal Power Commission v. Idaho Power Co., 344 U. S. 17	5, 6
Peoples Bank v. Eccles, 161 F. (2d) 636 (C. C. A., D. C.)	8
Republic Steel Corp. v. N. L. R. B., 311 U. S. 7	7
Ross Packing Co. v. United States, 42 F. Supp. 932	10
United States v. Chicago, M. St. P. & P. R. Co., 282 U. S. 311	6
United States v. Emery, Bird, Thayer Realty Co., 237 U. S. 28	10
United States v. Holland-American Lijn, 254 U. S. 148	10

Table of Statutes.

Shipping Act of 1916 (39 Stat. 728) 4
Merchant Marine Act of 1918 (40 Stat. 900) 4
Merchant Marine Act of 1920 (41 Stat. 988) 4
Merchant Marine Act of 1928 (45 Stat. 689) 4
Merchant Marine Act of 1936 (49 Stat. 1895) 4
Merchant Ship Sales Act of 1946 (60 Stat. 41) 4

Miscellaneous Citations.

Hearings on Senate Resolution 50, Magnuson Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 81st Congress, 2nd session, p. 603 4

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Respondent, by its attorneys of record, respectfully requests that no writ of certiorari issue in the above-entitled cause.

OPINION BELOW.

The opinion of the court below is reported at 117 F. Supp. 576.

STATEMENT OF THE CASE.

In January of 1948, Alaska Transportation Company purchased the vessel, *SS Empire Consequence*, from the Maritime Commission for the sum of $110,450. (R. 22-24.) Thereafter, the Company spent an aggregate of $227,276.79 for the purpose of converting the vessel for use in the Alaska trade. In June of 1948, all conversion work was

stopped because of excessive cost. In November of 1948, the Company ceased all shipping operations because of operating losses sustained in the 1948 shipping season. (Pars. 4 and 5, Clapp Affidavit, R. 106.)

After ceasing all shipping operations, Alaska Transportation Company made diligent efforts to find a United States citizen purchaser for the *SS Empire Consequence.* No such purchaser appeared who was willing to offer more than the scrap value of the vessel. Therefore, on or about July 7, 1949, the Company transferred the vessel to respondent in consideration of the cancellation by respondent of an indebtedness of the Company to him in the amount of $319,725.64. Said amount was the book value of the vessel on the date it was transferred to respondent. (Pars. 7 and 8, Clapp Affidavit, R. 107.)

Upon acquiring the *SS Empire Consequence,* respondent made diligent efforts to find a United States citizen purchaser for the vessel. Again, no such purchaser appeared who was willing to offer more than the scrap value of the vessel. Finally, on or about May 8, 1951, respondent contracted to sell the vessel "In Class" to Etela Suomen Lavia Oy, a Finnish corporation, for $325,000. Said $325,000 was less than respondent's investment in the vessel because respondent had to spend over $10,000 to insure and maintain the vessel while it was in his possession and over $50,000 to put the vessel "In Class". (R. 25-32; Pars. 8 and 9, Clapp Affidavit, R. 107-108.)

The aforementioned contract of sale was subject to the approval of the Maritime Administration required by Section 9 of the Shipping Act of 1916. Therefore, on or about May 15, 1951, respondent applied to the Maritime Administration for such approval. The Administration requested comments from the Department of Defense, the Department of State and the Office of International Trade, and. in due course, the Department of Defense reported that

sale of the *SS Empire Consequence* would not be harmful to the national defense of the United States, the Department of State reported that it would not be inconsistent with the foreign policy of the United States, and the Office of International Trade reported that it would not adversely affect the foreign commerce of the United States. The Maritime Administration concurred in these reports and also determined that the *SS Empire Consequence* was not necessary to the United States merchant marine. Thereupon, it approved respondent's application but conditioned its approval upon the payment of $7,500 to it by respondent. (R. 5-6, 57-58.)

As grounds for demanding said $7,500 from respondent, the Maritime Administration stated that respondent had an obligation to operate the *SS Empire Consequence* under United States laws and that the Maritime Commission had lost money by restricting itself to a domestic market when it originally sold the vessel. (R. 42-43, 52-53, 58.) Respondent paid the $7,500 under protest and, after filing fruitless claims for refund with the Maritime Administration and the Department of Commerce, brought the present suit for refund in the Court below. (R. 33-34, 35-41, 43-56, 48-51.)

QUESTIONS PRESENTED.

1. Whether the Court below usurped the functions of the Maritime Administration by striking a condition based on irrelevant considerations from the Maritime Administration's approval of the transfer of respondent's vessel.

2. Whether by accepting the Maritime Administration's approval of the transfer of his vessel, respondent estopped himself from challenging the validity of the condition attached thereto.

3. Whether the Court below had jurisdiction to decide the case at bar.

REASONS FOR DENYING THE WRIT.

1. Petitioner argues that the Court below usurped the functions of the Maritime Administration by deciding, in effect, that the Maritime Administration should have approved the transfer of respondent's vessel unconditionally. (Pet., p. 8, 10.) This argument assumes that the considerations which induced the Maritime Administration to condition its approval of the transfer of respondent's vessel upon the payment of $7,500 to it would have permitted the Maritime Administration to condition its approval of said transfer in some other manner or to withhold its approval of said transfer entirely. Such an assumption is erroneous.

The Shipping Act of 1916 (39 Stat. 728) is one of a series of statutes enacted by Congress for the purpose of providing the United States with a merchant marine adequate to carry its waterborne commerce and capable of serving as a naval and military auxillary in time of national emergency.[1] Section 9 of that Act, by requiring that an American citizen obtain permission from the Maritime Administration before transferring a vessel owned by him to a foreigner, encroaches seriously upon traditional concepts of private ownership. Therefore, it is to be administered in strict conformance with the above-stated Congressional purpose. This fact was recognized in hearings held in 1950 before the Magnuson Subcommittee of the Senate Committee on Interstate and Foreign Commerce. There, Mr. Coddaire, then a Commissioner of the Maritime Commission, testified as follows:[2]

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1. Cf. Merchant Marine Act of 1918 (40 Stat. 900); Merchant Marine Act of 1920 (41 Stat. 988); Merchant Marine Act of 1928 (45 Stat. 689); Merchant Marine Act of 1936 (49 Stat. 1895); Merchant Ship Sales Act of 1946 (60 Stat. 41).

2. Hearings on Senate Resolution 50 authorizing a merchant marine study. 81st Congress, 2nd session, p. 603.

"Accordingly, we should and must be guided in considering flag transfers by the national interest in an adequate American-owned merchant marine.

"Now, this presents the choice between one of two main standards. That is, whether the approval of a transfer should be given only where it can be affirmatively shown to be a direct benefit to the American merchant marine, or whether a transfer should be approved if it can be shown that there will be no detriment to the American merchant marine.

"The distinction, although possibly not at once apparent, is important because during times of peace the inherent and constitutionally protected private ownership rights are involved. *I am of the opinion that the latter standard should govern,* subject to other considerations, which I shall mention." (Emphasis supplied.)

As stated by the Maritime Administration, the considerations which induced it to condition its approval of the transfer of respondent's vessel upon the payment of $7,500 to it were, first, that respondent had an obligation to operate his vessel under United States laws and, second, that the Maritime Commission lost money by restricting itself to a domestic market when it originally sold respondent's vessel. The first of the aforementioned considerations is inconsistent with the Maritime Administration's findings that transfer of respondent's vessel would not adversely affect the water-borne commerce or national defense of the United States and that respondent's vessel was not needed for the American merchant marine. The second bears no relation to said findings and therefore is irrelevant. Obviously, such considerations could not justify attaching any condition to the approval of the transfer of respondent's vessel. Neither could they justify withholding said approval.

In support of its position, petitioner cites *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17. That case involved a license to construct transmission lines on Fed-

eral land near the Snake River in Idaho. The United States had existing power facilities near the Snake River and the license was conditioned upon the United States being allowed to use the transmission lines which the licensee proposed to build. As the Federal Power Commission had been directed by Congress to authorize only such power projects on Federal land as would fit into a comprehensive plan for the development of the power resources of the United States, it was clear not only that the aforementioned condition was based upon relevant considerations but also that excising it might destroy the justification for the license. Under the circumstances, this Court held that the license could not be enforced without the condition unless, upon remand, it was approved in such form by the Federal Power Commission. Such a case is entirely different than the case at bar where express findings with respect to all relevant considerations indicated that approval should be granted without condition, but a condition based upon irrelevant considerations was nonetheless attached to the approval. A condition based on irrelevant considerations is "separable" as that term was used by this Court in the *Idaho Power Co.* case when it said (344 U. S. 20):

> "* * * There doubtless may be situations where the provision excised from the administrative order is separable from the remaining parts or so minor as to make remand inappropriate. * * *"

See also *United States* v. *Chicago, M. St. P. & P. R. Co.*, 282 U. S. 311, 331.

In connection with an attempt to demonstrate that the Court below decided that the Maritime Administration could not, under any circumstances, exact money as a condition to approving the transfer of an American owned vessel to a foreigner, petitioner argues that the Maritime Administration could have demanded $7,500 from respond-

ent as a means of discouraging transfer of American owned vessels to foreigners. (Cf. Pet., p. 9, 14, 15.) This latter proposition was not suggested to the Court below and there is no basis in the record for saying that it was ever even considered by the Maritime Administration. Under the circumstances, its presentation to this Court is out of order. See *Delgadillo* v. *Carmichael*, 332 U. S. 388. Moreover, as noted previously, the Maritime Administration found that respondent's vessel was not needed for the American merchant marine. Discouraging transfer to foreigners of vessels not needed for the American merchant marine makes little sense as a general policy. When it takes the form of a monetary exaction for benefit of the Treasury of the United States, it becomes a penalty, and this Court has clearly indicated that an administrative agency cannot impose penalties as a means of exercising its regulatory functions. See *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7.

Petitioner protests that, by deciding the case at bar on a motion for summary judgment, the Court below deprived it of an opportunity to present evidence justifying the condition which the Maritime Administration attached to its approval of the transfer of respondent's vessel. (Pet., fn. 9.) This protest ignores the fact that petitioner itself filed a motion for summary judgment. It also ignores the fact that petitioner could have submitted any evidence it had to the Court below in the form of affidavits supporting its motion for summary judgment. (See Rule 51 of the Court of Claims.)

The Court below passed upon only one question; namely, whether the Maritime Administration could find, without qualification, that transfer of respondent's vessel to a foreigner would not adversely affect either the waterborne commerce or the national defense of the United States, and then could condition its approval of the transfer of re-

spondent's vessel upon the payment of money to it because respondent had an obligation to operate the vessel under United States laws or because the Maritime Commission lost money by restricting itself to a domestic market when it originally sold the vessel. (*Cf.* R. 225-226.) Such a narrow question does not merit the attention of this Court. Particularly is this true when the amount in controversy is only $7,500 and when petitioner knows of only "several instances" of conditions being imposed under like circumstances by the Maritime Administration. (*Cf.* Pet., fn. 16.)

2. Petitioner's argument (Pet., p. 12-13) to the effect that respondent is estopped from challenging the condition which the Maritime Administration attached to its approval of the transfer of respondent's vessel was looked upon by the Court below as being "beneath the dignity of the Government". Undoubtedly, the impatience of the Court below with respect to this argument arose from a knowledge of the great dangers inherent in arbitrary exercise of authority by a body not immediately responsible to the people. In any event, the cases cited by petitioner in support of this argument for the most part deal with situations in which litigants were attacking the validity of statutes under which they had previously obtained privileges. In refusing to follow such cases in a case substantially similar to the case at bar with respect to the question of estoppel, Judge Miller of the Court of Appeals for the District of Columbia said:[3]

> "Obviously the principle announced in these two cases, which is the same rule found in the other Supreme Court decisions cited by the appellees, does not apply where the litigant charges that the administrative body has exceeded the authority conferred upon

3. *Peoples Bank* v. *Eccles*, 161 F. (2d) 636, 644. This case was reversed on a point not relevant here, 333 U. S. 426.

it by a statute, but does not attack the validity of the statute.

"Whether estoppel has arisen, whether waiver has occurred, depends entirely upon whether Condition No. 4 is valid or invalid. No administrative body has authority to contract with a regulated corporation in a manner contrary to the statute which is being administered, nor in a way which does not give effect to the intent of Congress. The regulated corporation, by accepting such an invalid condition imposed by a regulatory authority, does not thereby waive the right to rely on the statute, and the right later to denounce the provision which contravenes it. * * *"

Callanan Road Improvement Co. v. *United States*, 345 U. S. 507, cited by petitioner, involved a litigant who was seeking to enforce a right the existence of which he had previously expressly denied. Respondent has taken no such inconsistent positions. At the time he paid his $7,500 to the Maritime Administration he protested against its collection and he has maintained that protest ever since.[4]

The *Callanan* case demonstrates that estoppel is essentially a doctrine of equity. Such a doctrine has a multitude of applications. Constant scrutiny of those applications would leave this court with little time for the more vital issues of the day with which it is primarily concerned.

3. Judisdictionally speaking, the case at bar involves the question of whether a citizen of the United States, who pays money to the United States pursuant to a demand therefor made by one of its administrative officials acting under one of its statutes, may bring suit against the United States for the return of the money on the ground that the statute under which the administrative official acted did

4. In light of respondent's protest, his payment can hardly be classified as voluntary. (Cf. Pet., fn. 15, p. 20.) Neither can it be classified as consideration for a profitable bargain unless the Maritime Administration is in the position of being able to sell its approvals of foreign transfers like articles of merchandise. (Cf. Pet., p. 13.)

not authorize its collection. Resolution of such a suit depends upon construction of a law of Congress. Therefore, such a suit is founded upon a law of Congress and is maintainable against the United States under the second subdivision of 28 U. S. C. 1491.[5] The Court below so held. By so holding, the Court below merely followed the doctrines announced by this Court in *Cohens* v. *Virginia*, 6 Wheat. 264; *Dooley* v. *United States*, 182 U. S. 222; and *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28.

Petitioner contends (Pet., p. 16-18) that the decision of the Court below is contrary to the decision of this Court in *United States* v. *Holland-American Lijn*, 254 U. S. 148. The *Holland-American Lijn* case is silent on the question of whether a suit like the present one is founded upon a law of Congress. When confronted with both this question and the *Holland-American Lijn* case, the courts consistently have held, as did the Court below, that the *Holland-American Lijn* case is not controlling and that an action is maintainable under the second subdivision of 28 U. S. C. 1491. See *Compagnie General Transatlantique* v. *United States*, 21 F. (2d) 465, affirmed 26 F. (2d) 195 (C. C. A. 2); *Carriso, Inc.* v. *United States*, 106 F. (2d) 707 (C. C. A. 9); *Ross Packing Co.* v. *United States*, 42 F. Supp. 932.[6] Peti-

5. Petitioner argues (Pet., p. 19-20) that the case at bar was not founded upon a law of Congress because it could not be known until petitioner answered respondent's complaint that disposition of respondent's complaint would depend upon construction of a law of Congress. The gravamen of respondent's complaint was that the Maritime Administration exacted money from him *without legal authority*. All authority of the Maritime Administration stems from laws of Congress so the legality of any of its actions necessarily involves construction of said laws. Respondent's complaint stated a cause of action founded upon a law of Congress regardless of how it was answered by petitioner.

6. To borrow a phrase from the Court below, petitioner's statement that the *Carriso* and *Ross Packing* cases are clearly not in point is "beneath the dignity of the Government". (Cf. Pet., fn. 13.)

tioner cites no cases contrary to these holdings. Under the circumstances, there is no occasion for the intervention of this court.

CONCLUSION.

The case at bar involves no important question of Federal law and no question as to which there is an existing conflict of opinion among the Federal courts. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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